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In the Supreme Court of the United States

OCTOBER TERM, 1977

MIAMI HERALD PUBLISHING COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 558 F. 2d 1202.

JURISDICTION

The judgment of the court of appeals (Pet. App. 19-20) was entered on September 12, 1977. A petition for rehearing was denied on October 18, 1977 (Pet. App. 21).

[1]Petitioners have named as a respondent the district judge who presided in the criminal trial. But the judge is not a party to a case in which he presides. He could be made a party in a mandamus proceeding (see *Vendo Co.* v. *Lektro-Vend Corp.*, No. 76-156, decided January 23, 1978), but this case reached the court of appeals by appeal, not by petition for a writ of mandamus. The United States, the plaintiff in the criminal trial and one of the apparent beneficiaries of the contested judicial orders, would appear to be a proper respondent.

The petition for a writ of certiorari was filed on January 16, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the district court properly and consistently with the requirements of the First Amendment regulated the public disclosure by court personnel of matters that had not been disclosed to the jury.

2. Whether the news media are entitled to notice and a hearing before a district court may issue an order regulating disclosure by court personnel of information that is not before the jury in an ongoing criminal trial.

STATEMENT

An indictment filed in the United States District Court for the Middle District of Florida charged Edward J. Gurney, then a United States Senator, and other defendants, with receiving bribes, making false declarations before a grand jury, and conspiracy to defraud the United States. The jury trial commenced on February 24, 1975.[2]

The case against Senator Gurney was of substantial public interest, and there was a great deal of pretrial coverage by the press. Prior to trial the district court discussed with counsel the techniques that should be used to shield the jury from prejudicial publicity. Defense counsel asked the court not to sequester the jury for what

[2]The present petition concerns only the first of two trials held on the charges in the indictment (Pet. 4 n. 1). Following the initial trial, which resulted in an acquittal on some counts and a hung jury on others, Senator Gurney was retried and acquitted on one of the remaining counts.

was expected to be a lengthy trial (Pet. App. 58). The court agreed not to sequester the jury, but, with the consent of all parties, adopted other prophylactic measures to insulate the jury from publicity about the case. These included repeated admonitions to the jurors not to listen to or view broadcasts concerning the trial and not to read any newspapers other than those furnished to them; articles about the trial were removed from the papers given to the jurors (Pet. App. 2, 34).[3] In deciding not to request sequestration, counsel relied on the fact that the district court expected to conduct certain proceedings surrounding the reception of evidence out of the hearing of the jury and the public (*ibid.*).[4]

Petitioners are newspapers and journalists who were interested in the trial. On several occasions during the trial, petitioner reporters sought to inspect particular documents and exhibits, some of which had been received in evidence and some of which had only been marked for identification. The clerk made available to petitioners materials that had been admitted in evidence and read to the jury; acting under the court's orders, however, the clerk refused to permit inspection of items marked for identification but not offered or admitted, and items admitted but not yet read or shown to the jury (Pet. App. 3).

[3]At the same time, efforts were made to accommodate reporters. A telephone room was provided for wire service representatives, reserved seating was secured for the press, and convenient seating was provided for a newspaper sketch artist (Pet. App. 2).

[4]In addition, the defendants and their attorneys were aware of the district court's order prohibiting them from discussing the case in public outside the courtroom (Pet. App. 57, 59). Petitioners do not challenge the validity of this "no comment" order (Pet. 9 n. 11).

On June 27, 1975, petitioners asked the district court to vacate the directives regulating disclosure of evidentiary materials (Pet. App. 22-28).[5] After conducting a hearing on petitioners' application (*id.* at 29-40), the district court, on July 1, 1975, issued a written order (*id.* at 41-44) permitting inspection of a particular defense exhibit (*id.* at 42) and allowing petitioners to examine all exhibits admitted in evidence subject to the schedule of the clerk (*id.* at 43). The court denied disclosure of exhibits identified but not received in evidence, and it reaffirmed its decision to conduct bench conferences with counsel outside the hearing of the press and public (*ibid.*).

The court also declined to allow disclosure of Senator Gurney's grand jury testimony, which had not been read to the jury in its entirety (*id.* at 42); the court permitted petitioners to obtain a transcript of the portion of the testimony that had been read to the jury (*id.* at 17). The district court also observed (*id.* at 43) that no one had suggested that the court "had ever directed petitioners or its representatives not to publish anything, or had ever prohibited petitioners or its representatives from obtaining from the court reporter, at their expense, any transcript of matters actually published to the jury."

On July 16, 1975, the district court orally denied petitioners' request to obtain a transcript of a proffer of testimony made at a bench conference (Pet. App. 45-47). On July 30, 1975, while the jury was deliberating,

[5]Petitioners also challenged the district court's refusal to permit the clerk to disclose (a) the list of all witnesses to be called at trial and (b) the names and addresses of the jurors (Pet. App. 23-24). The court permitted access to the witness list (*id.* at 43) but denied disclosure of juror information (*id.* at 42). Petitioners do not press this latter claim here.

petitioners requested, and the district court orally denied, permission to inspect a written communication from the jury and the court's written response (*id.* at 47-48, 52-53).

Petitioners appealed the district court's rulings, and the court of appeals affirmed (Pet. App. 1-18).[6] The court first concluded: (1) that petitioners have standing to assert whatever right of access to the various trial documents there may be; (2) that the district court's decisions were appealable; and (3) that the case was not moot despite the completion of the Gurney trial (*id.* at 6-9). The court then observed that this criminal case was "much publicized" (*id.* at 10), and that the district court had "employed reasonable 'remedial measures,' far short of prior restraints, to prevent possible prejudice and maintain an orderly trial" (*id.* at 17). The court of appeals concluded that the district court had "merely refused to allow the [petitioners] to inspect documents not a matter of public record" (*id.* at 10), and it held that under "present Supreme Court guidelines, we do not think that the press had any First Amendment right of access to those matters not available to the public" (*id.* at 13).

ARGUMENT

1. Petitioners contend that this case raises important questions concerning the First Amendment right of the press to gather information about criminal cases. We doubt, however, that any question is properly presented. No order was entered against petitioners; the only orders involved in this case are directions the district court gave to court personnel. Moreover, petitioners were not parties to the criminal cases; even if they could have intervened,

[6]Petitioners previously had sought writs of mandamus and prohibition. The court of appeals denied the petition, and petitioners then pursued an appeal (Pet. App. 4 n. 4).

they did not attempt to do so. Cf. *Central South Carolina Chapter, Society of Professional Journalists* v. *United States District Court*, 551 F. 2d 559 (C.A. 4) (attempted intervention impermissible; journalists told to proceed by separate civil suit). Petitioners did not file a civil suit challenging the district court's orders. Although they once filed a petition for a writ of mandamus, they did not pursue that remedy further after it was denied (Pet. App. 4 n. 4). Petitioners simply "appealed" the district court's instructions to the clerk. But because petitioners are not parties to this case, they have no right to appeal.[7] The court of appeals therefore should not have entertained petitioners' arguments. Because the court of appeals lacked jurisdiction, this case does not present the questions petitioners desire to have resolved.[8] Cf. *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737.

2. *a.* Even if we are mistaken about petitioners' right to appeal, there is no reason for this Court to grant the petition. This is not a case like *Nebraska Press*

[7]See *Ex parte Leaf Tobacco Board of Trade*, 222 U.S. 578, 581. A nonparty subject to a court order may appeal despite this rule, but the exception pertains only to the addressees of the order. A nonparty merely affected by an order directed to a party has no right to appeal; the nonparty must intervene first. Compare *Commercial Security Bank* v. *Walker Bank & Trust Co.*, 456 F. 2d 1352 (C.A. 10), with *Tryforos* v. *Icarian Development Corp.*, 518 F. 2d 1258, 1263 n. 22 (C.A. 7).

[8]We agree with the court of appeals, however, that this case is not moot (see *Nebraska Press Association* v. *Stuart*, 427 U.S. 539, 546-547), that an appeal is proper if petitioners are to be treated as parties, and that petitioners have standing to assert a claim of "access" to information. The press has standing because the "access" claim depends on the asserted needs of reporters. See *United States* v. *Cianfrani*, C.A. 3, No. 77-2445, decided March 16, 1978, slip op. 9-11. But the conclusion that the press has standing does not mean that there is a right of access; it means only that petitioners are appropriate persons to litigate whether there is such a right. For the reasons stated in the text, we do not believe there is.

Association v. *Stuart*, 427 U.S. 539, in which the court prohibited reporters from publishing information known to them; here no orders were directed to reporters. It is not even a case like *Central South Carolina Chapter* v. *Martin*, 556 F. 2d 706 (C.A. 4), certiorari denied, January 9, 1978 (No. 77-263), in which the trial court regulated pretrial statements by potential trial participants.[9] It is, instead, a case in which the district court (a) decided to conduct bench conferences *sotto voce*, and (b) told his clerk not to release copies of materials that had not been admitted in evidence.

Whatever special rules may be appropriate for "gag orders" (as in *Nebraska Press)* and "no comment orders" (as in *Martin*), they do not pertain to ordinary orders regulating the conduct of an ongoing trial. The court of appeals here simply recognized the traditional responsibility of district courts to prevent prejudicial disclosures by instructing court personnel not to release material that had not been admitted in evidence. In so doing, the court protected the rights of both the United States and the defendants to a fair trial designed to end in a just judgment.

b. The district court did not prohibit the publication of information known to the press, and petitioners disclaim (Pet. 13 n. 14) any special right to gain "access to information not shared by members of the public generally." *Pell* v. *Procunier*, 417 U.S. 817, 834. Petitioners contend, however, that they have a right to the "public records" of a public trial. But petitioners'

[9]The district court issued a "no comment" order in this case, but petitioners do not challenge it (Pet. 9 n. 11). Much of the reasoning we advanced in support of the court's order in *Martin* is applicable here, however. We are therefore furnishing petitioners with a copy of our brief in opposition in that case.

argument begs the question. No one would deny to petitioners access to public records; the question, rather, is whether all court records and proceedings must be "public."[10]

This Court has recognized that the right of the press to obtain access to court proceedings "must necessarily be subject to the maintenance of absolute fairness in the judicial process." *Estes* v. *Texas,* 381 U.S. 532, 539 (reversing a conviction obtained after a televised trial). Although the press has a right to publish information in the public domain, [11] no case has held that the press has a constitutional right to compel the court to make particular information public. To the contrary, the Court

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[10]This case therefore has nothing in common with *United States* v. *Mitchell,* 551 F. 2d 1252 (C.A.D.C.), certiorari granted *sub nom. Nixon* v. *Warner Communications, Inc.,* 430 U.S. 944, argued November 8, 1977, to which petitioners refer. That case involves access after trial to oral recordings that were admitted in evidence. This case, by contrast, involves access during trial to materials that were not admitted. Petitioners now have full access to the entire record of the present case; there was a delay in access, but not a permanent denial.

Petitioners also can draw no support from *In re Washington Post Co.,* C.A. 4, No. 76-1695, decided July 9, 1976 (Pet. App. 67-68). That unpublished order set aside a decision of a district court sealing all papers filed in a criminal case. Here, by contrast, the order pertained only to matters not yet admitted in evidence.

Finally, this is not a case in which a hearing was entirely closed or records permanently sealed. One court has held that the Sixth Amendment places restraints on such closings. *United States* v. *Cianfrani, supra.* But that court also rejected First Amendment arguments against the closure, endorsing the decision in the instant case (slip op. 40-41).

[11]See, *e.g., Oklahoma Publishing Co.* v. *District Court,* 430 U.S. 308; *Nebraska Press Association* v. *Stuart supra; Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469.

has repeatedly suggested that, in appropriate cases, trial courts may control information to prevent prejudicial disclosures. See, *e.g., Nebraska Press Association* v. *Stuart, supra,* 427 U.S. at 553-554, 564; *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469; *Branzburg* v. *Hayes,* 408 U.S. 665, 684-685; *Sheppard* v. *Maxwell,* 384 U.S. 333, 355, 358-363. Mr. Justice Brennan, concurring in the judgment in *Nebraska Press,* stated that courts "may stem * * * the flow of prejudicial publicity at its source, before it is obtained by representatives of the press" (427 U.S. at 601). Mr. Justice Brennan also stated, correctly in our view, that "[i]t is very doubtful that the court would not have the power to control release of information by [court officials] in appropriate cases * * *" (*id.* at 601 n. 27).

Supervisory limitations on the disclosure of information by court officials are a less drastic alternative than prior restraints on the press. We believe that the only reasonable dispute concerns the circumstances under which courts should use limitations. Petitioners contend that the courts of appeals and the state courts have announced different rules for determining when restrictive orders are appropriate, and that this difference requires resolution by this Court.

But the cases to which petitioners refer (Pet. 18-22) involve either broad "no comment" orders or orders closing entire trials or hearings. This, to our knowledge, is the first case involving an order, directed only to court personnel, temporarily withholding matters not in evidence. Petitioners were permitted to be present during the entire trial and to report on what they saw and heard; no effort was made to prevent them from conducting interviews outside of court and gathering information by

their own devices.[12] The different verbal standards for use in "closure" and "no comment" cases therefore are beside the point in a case such as this one.[13]

The record in the present case demonstrates that the district court properly exercised its authority. The criminal proceedings were highly publicized. The jury was not sequestered. Any disclosure during trial of inadmissible or unadmitted evidence created a risk that the jury would learn of that evidence. The trial was difficult and lengthy, and the district court therefore was entitled to take reasonable precautions against prejudice.[14] Moreover, Fed. R. Crim. P. 6(e) independently forbade disclosure of Senator Gurney's grand jury testimony. Finally, the district court was not required to disclose the contents of communications to and from the jury. As the court of appeals soundly observed: "Compelling governmental interest in the integrity of jury deliberation requires that the privacy of such deliberations and communications dealing with them be preserved" (Pet. App. 17).

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[12]Petitioners do not challenge the district court's "no comment" order (Pet. 9 n. 11). That order, moreover, was directed only to the defendants and their attorneys (Pet. App. 59); it did not bar statements by potential witnesses or other persons with information about the case.

[13]We doubt, moreover, that the different verbal standards reflect truly different approaches to the question. We discussed that matter at greater length at pages 10-12 of our brief in opposition in *Central South Carolina Chapter* v. *Martin, supra,* and we rely on that discussion here.

[14]The bench conferences concerned evidence that had not yet been (and might never be) admitted, and the court therefore properly conducted them quietly. The reporters were allowed to remain in court, however, and those with sharp ears were free to report what they heard.

In sum, the district court's actions here would have been appropriate under any reasonable standard.[15] The withheld materials were placed in the public record once the jury returned its verdict. There was no censorship of the press or permanent denial of access to information. There is no conflict among the circuits concerning the standards for instructing court officials not to disclose during trial information that is not in evidence.[16] There is, therefore, no reason for review by this Court.

3. Petitioners also contend (Pet. 27-28) that they were entitled to notice and a hearing before the district court issued its orders. A similar question was presented concerning a "no comment" order in *Central South Carolina Chapter* v. *Martin, supra.* This Court denied the petition for a writ of certiorari in that case. There is no greater reason to grant review here, and the petition should be denied for the reasons stated at pages 15-17 of our brief in opposition in *Martin.* In both cases, the district courts' orders were addressed, not to the press, but

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[15]Petitioners express concern that the court of appeals, by not announcing a clear standard to guide district courts in future cases, has invited courts to close proceedings for no reason at all. We do not read the court of appeals' decision in this way, and we believe that information should be withheld only when it appears reasonable to do so to preserve the fairness of the trial. But however that may be, the failure of the court of appeals to announce a particular standard is not a reason for this Court to grant review, where, as here, the selection of one standard rather than another would not change the outcome.

[16]See also *Report of the Committee on the Operation of the Jury System on the "Free Press—Fair Trial" Issue,* 45 F.R.D. 391, 401, 403: "[T]he district court has the power and duty to prohibit prejudicial disclosures by courthouse personnel, such as * * * clerks * * * and court reporters. * * * [Moreover,] it is established practice in many districts for bench conferences * * * to be conducted out of the hearing of all persons except the participants."

to the trial participants. Only the addressees of the orders are subject to penalties for disobedience, and thus only they have a sufficient stake in the validity of the orders to be entitled to a prior hearing.[17]

Moreover, the court of appeals concluded (Pet. App. 18), petitioners received a prompt and full hearing on their complaint that certain materials should not be withheld from the public domain. Following that hearing, the district court permitted disclosure of some items and explained its reasons for prohibiting exposure of the remaining material. These procedures were adequate to protect whatever interest petitioners may have had in disclosure of the material. As the court of appeals explained (Pet. App. 18 n. 15):

> it is unreasonable to require a district judge to hold hearings and to issue special orders with respect to every request he is presented with by the press during the course of a long trial. * * * It is the trial court's responsibility to decide which documents will be placed in the public domain, and which are entitled to privacy and confidentiality. These decisions are discretionary, numerous, and form an integral part of trial management. The efficient administration of the trial courts would be significantly impaired should we require hearings and special orders for each such decision.

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[17]If, as petitioners concede (Pet. 13 n. 14), the press has no greater right than the general public to scrutinize inadmissible evidence in the midst of a criminal trial, then presumably members of the public are similarly entitled to the same right to notice and hearing claimed by petitioners. Such a requirement would create considerable problems of notice and opportunities for disruption of an ongoing trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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